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Supreme Court, U.S.
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No. 03-774

In the Supreme Court of the United States

THE STATE OF ILLINOIS,

Petitioner,

vs.

BERNARD BUNCH,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. RESPONDENT HAS CONCEDED THAT THERE IS NATIONWIDE CONFUSION REGARDING WHETHER POLICE OFFICERS MAY QUESTION PASSENGERS OF LAWFULLY STOPPED VEHICLES.

The petition demonstrated that lower courts across the Nation are conflicted as to whether police officers may question automobile passengers when conducting routine traffic stops, and that the Illinois Supreme Court's splintered decision accurately mirrors the general confusion in the law. Pet. 10-15. Petitioner further demonstrated that the majority below erred in analyzing the issue under *Terry v. Ohio*, 392 U.S. 1 (1968), instead of *Florida v. Bostick*, 501 U.S. 429 (1991), and *United States v. Drayton*, 536 U.S. 194 (2002), since respondent's freedom of movement was restricted by circumstances other than police conduct directed toward him and because Officer Lukensmeyer did nothing to coerce his cooperation. Pet. 9-10. Finally, petitioner explained that the officer asking respondent for his name and travel history was reasonable and within the "community caretaking function" because the only other option would have been to leave respondent stranded at the side of the road in the middle of the night with no means of transportation. Pet. 16-17.

In his Brief in Opposition, respondent fails to directly contest any of these points. In fact, respondent specifically acknowledges that "there is a split among the federal Circuits with regard to whether an officer needs to articulate a justification for interrogating the passenger of an already stopped vehicle" (Opp. 10), and that "there are a wide variety of appellate court opinions across the nation with regard to the propriety of law-enforcement questioning directed toward passengers during routine traffic stops" Opp. 11-12. For this reason alone, the petition presents a compelling reason for granting certiorari, as police officers throughout the Nation

need to know when, and under what circumstances, they can question those passengers, ask for identification, and obtain other information.

Furthermore, rather than responding to the arguments presented in the petition, respondent contends that under *Florida v. Royer*, 460 U.S. 491 (1983), the Illinois Supreme Court properly held that his Fourth Amendment rights were violated because the questions Officer Lukensmeyer posed to him exceeded both the scope and extended the duration of the initial traffic stop. Opp. 8-9. Respondent's assertion completely ignores the fact that *Royer* is inapplicable to the present case since unlike Royer, who was properly stopped at an airport after the officers determined that he fit a "drug courier profile" but was improperly taken to a different location for further investigation, respondent here was never the subject of the police suspicion that triggered the traffic stop. See *Maryland v. Wilson*, 519 U.S. 408, 413-14 (1997) (recognizing that passengers of stopped vehicles are stopped as the result of circumstance as opposed to police action directed toward them).

Moreover, it is uncontested that Officer Lukensmeyer did not approach respondent or direct him to exit the vehicle until *after* the purpose of the traffic stop was completed and the driver was arrested. Thus, neither the scope of the stop nor its duration were affected in any manner when Officer Lukensmeyer asked respondent "[w]hat's your name. Where you [sic] coming from?" Also, because he was not being detained pursuant to police action, but was instead simply the victim of circumstances which left him stranded on the side of the road in the middle of the night, such questions were entirely permissible. See *Royer*, 460 U.S. at 497-98 (recognizing that mere police questioning, without more, is insufficient to implicate the Fourth Amendment).

Moreover, respondent mischaracterizes petitioner's reliance upon *Wilson*, and asserts that petitioner has waived any claim

that its holding should be extended to include inquiries into a passenger's identity or travel history in order to assure officer safety. Opp. 9. However, a simple reading of the petition reveals that no such claim was ever made. Rather, it is clear that the citation to *Wilson* was to demonstrate that the instant petition presents an issue which has never been resolved by this Court. Pet. 11 (citing *Wilson*, 519 U.S. at 414-15 n.3).[1]

Finally, respondent claims that petitioner "ignored" Officer Lukensmeyer's testimony that he questioned respondent because he was "curious to find out exactly who he was. That's all," and that therefore any assertion that the questions were intended to determine if respondent would be able to drive the car should be rejected. Opp. 9-10. However, respondent fails to recognize that the trial court judge who heard the testimony found that the officer "ha[d] numerous reasons to be conducting conversations with the [respondent,] including explaining to him the reasons for the arrest[,] to determine whether or not who he is [sic] so that perhaps he can be an alternate driver." The court also found that if respondent was to be an alternative driver, the officer was responsible for determining if that driver was: (1) impaired; (2) licensed to drive; and (3) able to drive. As this Court held in *Ornelas v. United States*, 517 U.S. 690, 699 (1996), "a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." Therefore, it is the findings of the trial court, which were made after considering the testimony as a whole, which control rather than isolated portions of that testimony.

More importantly, respondent's argument regarding Officer Lukensmeyer's motivation must be rejected, as it is premised upon his subjective intent rather than what was objectively

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[1] Of course, officer safety cannot be ignored when assessing the reasonableness of police conduct during traffic stops. See *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977).

reasonable. It is well-settled that the "touchstone" of Fourth Amendment analysis is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Pennsylvania v. Mimms*, 434 U.S. 106, 108-109 (1977) (per curiam) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)). Moreover, reasonableness must be viewed under an objective standard, rather than one based upon the subjective motivations of the police officer. See *Whren v. United States*, 517 U.S. 806, 813 (1996) (stating that "we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers"). Because it is entirely reasonable for police officers to pose questions to persons who are left stranded by the side of the road in the middle of the night after their traveling companion has been arrested, it is clear that respondent's Fourth Amendment rights were not infringed in this case. Accordingly, the petition for certiorari should be granted.

II. WHETHER THE ARRESTING OFFICER HAD PROBABLE CAUSE IS IRRELEVANT TO THE QUESTION.

Respondent urges that this Court deny the petition for writ of certiorari because Officer Lukensmeyer lacked probable cause to arrest respondent. According to respondent, "[t]his secondary issue further complicates the resolution of this case and is an additional reason to deny the State's Petition." Opp. 14. Respondent's argument fails for three reasons.

First, whether the arresting officer had probable cause to arrest is irrelevant to the question presented: whether a police officer may question a passenger of a vehicle lawfully stopped for a traffic violation after the purpose of the stop has been completed, even though the officer does not have reason to believe that criminal activity is afoot.

Second, this issue was never reached by the Illinois Supreme Court.

Third, in any event, probable cause existed to support the arrest. Probable cause for an arrest exists when facts and circumstances within the arresting officer's knowledge are sufficient to warrant a person of reasonable caution to believe that an offense has been committed and that the person arrested has committed the offense. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). Although probable cause requires more than mere suspicion, it does not require the arresting officers to have in their hands evidence sufficient to convict. *Brinegar v. United States*, 338 U.S. 160, 174-76 (1949).

It is important to keep true to the notion that "[t]here is no war between the Constitution and common sense." *Mapp v. Ohio*, 367 U.S. 643, 657 (1961). "Probable cause does not emanate from an antiseptic courtroom, a sterile library, or a sacrosanct adytum, nor is it a 'pristine philosophical concept existing in a vacuum,' but rather, it requires a pragmatic analysis of 'every day life on which reasonable and prudent persons, not legal technicians, act.'" *United States v. Davis*, 458 F.2d 819, 821 (D.C. Cir. 1972) (citations omitted). In fact, probable cause does not even require that the officer's belief be "more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742 (1983). As this Court observed:

> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, *but as understood by those versed in the field of law enforcement*.

Illinois v. Gates, 462 U.S. 213, 232 (1983) (emphasis added). An item may be seized without a warrant under the plain view

doctrine. The plain view doctrine applies where: (1) the police view the object from a place where they are legally entitled to be; and (2) it must be immediately apparent to the police that the items may be evidence of a crime, contraband, or otherwise subject to seizure. *Horton v. California*, 496 U.S. 128, 136-37 (1990).

The present case is a clear example where the plain view doctrine applies. As to the first requirement, the officer viewed the object during a conversation with respondent while standing on the side of the road. This was not a coercive setting. This is plainly obvious through the actions of respondent prior to the arrest. He felt comfortable enough not only to answer the officer's questions about who he was but, more importantly, to engage the officer in further conversation by posing a question to the officer about his brother's arrest. Clearly, the officer viewed the object from a place where he had a right to be. As he testified on direct examination, because he placed the driver under arrest, the vehicle was then the officer's responsibility.

The second requirement of the plain view doctrine is also satisfied. Officer Lukensmeyer, a 35-year veteran police officer with over 2000 narcotics arrests, testified that during the conversation, he twice saw a small clear plastic item containing something white and that he knew that it was contraband, either heroin or cocaine. App. A at 2-3.

When looking to all the factors the officer had before him, the fact that he knew he was looking at contraband, his extensive experience, the fact that the drugs were in plain view, and the clear instruction of analogous case law, the existence of probable cause is obvious.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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